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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1376

~~WOLF CORPORATION, JOSEPH WOLF, JOSEPH ECKHAUS, LEON SPILKY, DAVID BERDON &~~ ~~CO., and~~ TROSTER, SINGER & CO.,

Petitioners,

—against—

LEON GREEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: May 8, 1969.

Petitioner Troster, Singer & Co. ("Troster Singer") hereby adopts the statement of facts and arguments made by the petitioners Wolf Corporation, Joseph Wolf, Joseph Eckhaus, Leon Spilky and David Berdon & Co. In order to avoid burdening the Court with a repetition of those facts and arguments, it will not repeat them here. The reason for this separate petition is that an additional question is presented for review by this Court which applies only to the petitioner Troster Singer.

The Separate Question Presented

That question is whether a party may be joined as a defendant in a class action brought on behalf of persons with which said party defendant concededly had no connection.

Additional Facts Relied Upon by Troster Singer

The petitioner Troster Singer had no connection of any kind with the first prospectus dated June 2, 1961 or with the second prospectus dated January 26, 1962 (49a-50a*). Its only connection with any of the three prospectuses described in the main petition at pages 6-7 is that its name appeared as prospective underwriter in the preliminary prospectus dated June, 1962, which prospectus bore the following legend:

> "A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. Information contained herein is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective. This pro-

*As in the petition submitted on behalf of the petitioners, references to the appendix printed by the appellant, the respondent here, are followed by the letter "a", and references to the supplementary appendix printed by the appellee, Troster Singer, are preceded by the letter "S")

spectus shall not constitute an offer to sell or the solicitation of an offer to buy". (Ex. C)

In spite of this lack of connection with the two earlier prospectuses, Troster Singer is joined as a defendant in a class action in which the claims of those persons who purchased Wolf Corporation securities up to a year prior to the time of the third prospectus (which never became effective) are asserted.

POINT I

THE COURT OF APPEALS SHOULD NOT HAVE PERMITTED PLAINTIFF TO MAINTAIN A CLASS ACTION AGAINST TROSTER, SINGER & CO. SINCE IT HAD NO CONNECTION WITH MOST OF THE MEMBERS OF THE CLASS WHO ARE POTENTIAL PLAINTIFFS.

Plaintiff purports to represent approximately 2,200 persons who purchased the securities of the Wolf Corporation between June 1, 1962 and the end of 1963, when the stop order proceedings became public (See main petition, pp. 8-9).

Any defense Troster Singer may assert with respect to the third prospectus dated June, 1962 will inevitably be prejudiced by having to be heard along with all of the claims of those who purchased as a result of the two earlier prospectuses with which it had no connection. This is particularly so because, as the District Court found, the third prospectus never became effective and not a single share of the stock it covered was ever sold to the public. Under the decision of the Court of Appeals, Troster Singer will be required to defend its connection to the last of these prospectuses in a class action in which the largest number of plaintiffs will be those who purchased pursuant to the earlier effective registration statement with which Troster Singer had no connection. •

As to Troster, Singer, there are no common questions of law or fact between those who purchased prior to June 1, 1962, and those who purchased subsequent to that date and the end of 1963, because it had nothing whatever to do with those who purchased prior to June, 1962.

Furthermore, a purchaser who bought securities after June 1, 1962, in order to recover against Troster Singer would have to prove that he did so on the basis of the June, 1962 preliminary prospectus which was never circulated to the general public, and which bore the legend that it was not effective and that the information contained therein was subject to completion or correction. Establishing a defense to the claims of such persons will inevitably be made more difficult if such claims are joined together with the claims of all those who purchased prior to June, 1962, as a result of an earlier effective registration statement with which Troster Singer was not connected in any way.

The fundamental premise upon which Rule 23 permits class actions is that common questions must predominate. The decision of the Second Circuit ignores that premise and requires Troster Singer to defend an action in which the claims of those with which it had no connection of any kind will predominate. This will, in effect, read out of the Rule its express language and place an intolerable burden on anyone connected in any way with securities offered or to be offered for sale to the public.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Dated: May 8, 1969.

Respectfully submitted,

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